No. 21,016

IN THE

United States Court of Appeals

For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellant and Cross-Appellee,

vs.

E. B. WELCH,
Appellee and Cross-Appellant.

PETITION OF APPELLANT FOR REHEARING

LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES,
GRAYDON S. STARING,
FREDERICK W. WENTKER, JR.,
311 California Street.
San Francisco, California 94104,
Attorneys for Appellant and Petitioner.

FILED
MAY 19 1967
WM. B. LUCK, CLERK

APR 26 1967

PERNAU-WALSH PRINTING CO., SAN FRANCISCO

No. 21,016

IN THE

United States Court of Appeals

For the Ninth Circuit

AMERICAN PRESIDENT LINES, LTD.,
a corporation,
Appellant and Cross-Appellee,

vs.

E. B. WELCH,
Appellee and Cross-Appellant.

PETITION OF APPELLANT FOR REHEARING

To the Honorable Oliver D. Hamlin, Jr., Frederick G. Hamley, and Ben Cushing Duniway, Circuit Judges:

APPELLANT PETITIONS THE COURT FOR REHEARING BECAUSE THE DECISION WAS REACHED UPON A FACT STATED TO BE IN THE RECORD, WHICH FACT IS NOT IN THE RECORD.

The Court at page 5 of its Opinion disposes of Appellant's Specification No. 1 by saying that there was "ample testimony in the record * * * that the carrying * * * of the crosshead was a two-man job. Appellant produced no witness to testify to the contrary." Both statements are untrue. We assume the Court does not desire to rest its judgment upon false premises.

Welch, Pak and Goodheim testified that the carrying of the crosshead "was a two-man job"; however, the record also shows it had never been carried before, and that these witnesses were all talking about carrying a crosshead which weighed 100 to 125 pounds. Appellant thereafter produced one witness (Deering), who testified to the contrary—that the object weighed 42 pounds. The Weighmaster's Certificate corroboates Deering's testimony. The crosshead itself is in evidence.

Welch's own testimony was that it was perfectly proper by custom and practice aboard merchant vessels for engineering personnel to carry weights up to 80 to 90 pounds, and it was only the weight about which he was complaining. There is no contrary testimony.

The Court of Appeals' Opinion is simply wrong in stating that the trial record supports the Opinion. The matter has been fully briefed to the Court with appropriate references to the record. Nowhere in the Briefs is there any citation to the record indicating that the carrying of a 42-pound crosshead requires two men on this or any other ship. Nowhere in the Briefs is there any citation to the record indicating a contradiction to Welch's testimony that by custom and practice on *all* merchant vessels it was perfectly proper to carry weights up to 80 to 90 pounds, much less 42 pounds. The Court of Appeals has not cited or quoted any such testimony either.

The District Court fully considered all of the claims of the plaintiff, and specifically found that the cause of the accident was *solely* the carrying of the crosshead. Plain-

tiff's attempt to escape this finding and to find liability on other aspects of the work was rejected in the District Court, and this has been fully treated in the Briefs and on oral argument.

The record does not support the Judgment. Nowhere in this record is there any testimony that the carrying of a 42-pound crosshead was a two-man job. The testimony of Pak, Welch and Goodheim that carrying the crosshead "was a two-man job", referred to a much larger, and totally irrelevant object. Deering, and also Welch on cross-examination, proved conclusively that the opinions offered by Welch's witnesses were worthless and irrelevant with reference to a 42-pound crosshead, and thereafter Welch offered no further proof.

Since the decision of this Court in this case, the Supreme Court has rendered its Opinion in the case of *Waldron v. Moore-McCormack Lines,* 35 U.S. Law Week 4389. In that Opinion the Supreme Court sustained the proposition that a ship may be found unseaworthy where the sole cause of unseaworthiness refers to an assignment of an insufficient number of men to do a particular job, and as a result an injury occurs. If Welch had been hurt in dismantling the pump, a portion of the task which undeniably required two men, and for which he actually had a helper, the trial court's decision would have to be affirmed, simply upon the *Waldron* Opinion. The fact is, however, that the *Waldron* Opinion in no way affects the initial specification of error made by Appellant in this case, since Welch was hurt only while carrying a 42-pound weight.

Appellant respectfully requests that the Court grant Appellant's Petition for Rehearing, and reverse the Decision of the Trial Court with respect to the initial finding of liability.

Dated, San Francisco, California,
May 19, 1967.

Respectfully submitted,
LILLICK, MCHOSE, WHEAT, ADAMS & CHARLES,
GRAYDON S. STARING,
FREDERICK W. WENTKER, JR.,
Attorneys for Appellant and Petitioner.

CERTIFICATE OF COUNSEL

I, Frederick W. Wentker, Jr., of attorneys for Appellant and Petitioner, hereby certify that in my judgment the foregoing Petition for Rehearing is well founded and that it is not interposed for delay.

FREDERICK W. WENTKER, JR.,
Of Attorneys for
Appellant and Petitioner.